Sam Hong Choy v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J-05-85 OF 1995
NH CHAN, AHMAD FAIRUZ AND HAIDAR JJCA
28 JULY 1999

Criminal Procedure *— Appeal — Fact, finding of — Conviction based on finding of facts and credibility of witnesses — Scope of appellate court's power to disturb finding*

Criminal Procedure *— Arrest — Arrest by private person — Scope and effect of such power — Whether a private person may arrest on mere suspicion or opinion — Construction of words 'in his view' under s 27 of Criminal Procedure Code — Whether liberal interpretation to be given*

The appellant together with an unidentified man had robbed PW8 at gun-point. PW9, a member of the public, heard gun-fire and shouts and saw two men running past him; one was carrying a plastic bag whilst the other whom he later identified as the appellant, was armed with a pistol. PW9 gave chase, caught up with the appellant and after a brief struggle successfully apprehended the appellant. In the ensuing struggle, the appellant drew his pistol and fired a shot. The appellant was subsequently convicted in the High Court on two amended charges, respectively under the Firearms (Increased Penalties) Act 1971 and Arms Act 1960 (see [1995] 4 MLJ 121). In respect of the first amended charge under s 3 of the Firearms (Increased Penalties) Act 1971, he was sentenced to death whilst under the second amended charge under s 8(a) of the Arms Act 1960, he was sentenced to three years' imprisonment. On appeal to the Court of Appeal, two main issues, anchored on the first amended charge, arose for the court's determination. The issues were namely: (i) whether PW9 was lawfully empowered to arrest the appellant; and (ii) whether at the time of committing the scheduled offence under the Firearms (Increased Penalties) Act 1971, the appellant had discharged a firearm with the intention to cause death or hurt to PW9, notwithstanding that no hurt was caused thereby. Counsel for the appellant submitted, inter alia, that: (a) that s 27(i) of the Criminal Procedure Code which provides for arrests by private persons did not apply by virtue of the meaning attributed to the words 'in his view' in the section; and (ii) that there was no intention on the part of the appellant to cause death or hurt to PW9. On this point, counsel further submitted that the discharge of the firearm was accidental and occurred during the struggle with PW9.

Held, dismissing the appeal and confirming the sentences:

(1) The words 'in his view' in s 27 of the Criminal Procedure Code must be given a liberal interpretation. However, these words do not cover arrest on mere suspicion or opinion. The words would cover a situation where although the private person does not actually witness the non-bailable and seizable offence being

committed, he is certain that the persons running away or trying to escape were the offenders themselves, as he was in such close proximity to the scene of the crime (see p 441E–F). A

(2) The finding of the trial judge on the issue of whether the appellant had the intention to cause death or hurt to PW9 at the time the scheduled offence was committed was based on a finding of fact and credibility of witnesses. An appellate court should therefore be slow to disturb such finding since the credibility of a witness is primarily a matter for the trial judge unless the decision is plainly wrong and against the weight of the evidence (see pp 442D–443A). B

C

[Bahasa Malaysia summary

Perayu bersama-sama dengan seorang lelaki yang tidak dikenal pasti telah merompak PW8 dengan mengacukan pistol. PW9, seorang orang awam, telah mendengar tembak-menembak dan jeritan dan melihat dua orang lelaki berlari di hadapan beliau; seorang membawa beg plastik manakala seorang yang lain yang beliau kemudiannya mengenalpasti sebagai perayu bersenjatakan sepucuk pistol. PW9 mengejar, menyaingi perayu dan selepas pergelutan singkat berjaya menangkap perayu. Dalam pergelutan berikutnya, perayu telah mencabut pistol beliau dan melepaskan suatu tembakan. Perayu kemudiannya disabitkan di Mahkamah Tinggi atas dua tuduhan terpinda, masing-masing di bawah Akta Senjata (Penalti Lebih Berat) 1971 dan Akta Senjata 1960 (lihat [1995] 4 MLJ 121). Berkaitan dengan tuduhan terpinda yang pertama di bawah s 3 Akta Senjata (Penalti Lebih Berat) 1971, beliau dijatuhkan hukuman mati sementara di bawah pindaan terpinda yang kedua di bawah s 8 Akta Senjata 1960, beliau dijatuhkan hukuman tiga tahun pemenjaraan. Atas rayuan ke Mahkamah Rayuan, terdapat dua isu utama, yang diasaskan atas pindaan terpinda yang pertama, iaitu: (i) sama ada PW9 adalah secara sahnya diberi kuasa untuk menangkap perayu; dan (ii) sama ada pada masa melakukan kesalahan yang dijadualkan di bawah Akta Senjata (Penalti Lebih Berat) 1971, perayu telah melepaskan senjata dengan niat untuk mengakibatkan kematian atau kecederaan kepada PW9, meskipun tiada kecederaan telah diakibatkan. Peguambela kepada perayu menghujahkan bahawa, antara lain: (a) bahawa s 27(i) Kanun Prosedur Jenayah yang memperuntukkan untuk tangkapan-tangkapan oleh orang awam adalah tidak terpakai oleh kerana maksud yang diberikan kepada perkataan-perkataan 'dalam pandangan beliau' di dalam seksyen tersebut; dan (ii) bahawa tiada terdapatnya niat pada pihak perayu untuk mengakibatkan kematian atau kecederaan kepada PW9. Atas perkara ini, peguambela selanjutnya menghujahkan bahawa pelepasan senjata tersebut adalah tidak sengaja dan berlaku semasa pergelutan dengan PW9. D E F G H I

Diputuskan, menolak rayuan dan mengesahkan hukuman-hukuman:

(1) Perkataan-perkataan 'dalam pandangan beliau' dalam s 27 Kanun Prosedur Jenayah mesti diberikan suatu tafsiran liberal. Walaupun demikian, perkataan-perkataan ini tidak merangkumi tangkapan atas rasa syak atau pendapat semata-mata. Perkataan-perkataan tersebut adalah merangkumi suatu keadaan di mana walaupun orang persendirian tidak sebenarnya menyaksikan kesalahan tidak boleh dijamin dan boleh tangkap tersebut dilakukan, beliau adalah pasti bahawa orang-orang yang melarikan diri atau cuba melepaskan diri adalah pesalah-pesalah, memandangkan beliau berada berdekatan dengan tempat berlakunya kejadian jenayah tersebut (lihat ms 441E–F).

(2) Penemuan hakim perbicaraan di atas isu sama ada perayu mempunyai niat untuk mengakibatkan kematian atau kecederaan kepada PW9 pada masa kesalahan yang dijadualkan tersebut dilakukan adalah berdasarkan penemuan fakta dan keboleh-percayaan saksi-saksi. Suatu mahkamah rayuan akan was-was semasa mengganggu penemuan sedemikian memandangkan kebolehpercayaan seorang saksi adalah terutamanya suatu perkara untuk hakim perbicaraan kecuali keputusan tersebut adalah dengan jelasnya silap dan bertentangan dengan berat keterangan (lihat ms 442D–443A).]

Notes

For cases on appeal based on findings of facts, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 249–298.

For cases on arrest generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 516–566.

Cases referred to

Abdul Aziz v Emperor AIR 1933 Pat 508 (refd)
Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)
Durga Singh v Md Isa [1963] 1 Cri LJ 827 (refd)
Kartar Singh v State NR 1956 Punjab 122 (refd)
Metro (Golden Mile) Pte Ltd v Paul Chua Wah Liang (High Court, Singapore) (unreported) (refd)
PP v Sam Hong Choy [1995] 4 MLJ 121 (refd)

Legislation referred to

Arms Act 1960 s 8(a)
Criminal Procedure Code (FMS Cap 6) s 27(i)
Criminal Procedure Code 1973 ss 43, 59(1) [India]
Firearms (Increased Penalties) Act 1971 s 3

Appeal from: Criminal Trial No 51–1 of 1992 (High Court, Johor Bahru)

Karpal Singh (*Karpal Singh & Co*) for the appellant. A

Abang Iskandar bin Abang Hashim (deputy public prosecutor) for the respondent.

Haidar JCA (delivering judgment of the court): The appellant in this case was charged with the following two amended charges at the High Court, Johor Bahru: B

Pertuduhan pindaan pertama:

Bahawa kamu, pada 23 November 1990 jam lebih kurang 3.50 petang, di tempat letak kereta di hadapan Kompleks Tun Abdul Razak bersebelahan Panggung Rex, Jalan Wong Ah Fook, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, pada masa melakukan satu C kesalahan berjadual iaitu menghalang tangkapan terhadap kamu telah melepaskan tembakan dari sepucuk pistol ke arah Syed Mohsin bin Syed Sagaf (K/P No 5372227) dengan niat untuk mendatangkan kematian atau cedera terhadap beliau, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 3 Akta Senjatapi (Penalti-Penalti Lebih Berat) 1971 (Akta 37). D

Pertuduhan pindaan kedua:

Bahawa kamu pada 23 November 1990 jam lebih kurang 3.50 petang, di tempat letak kereta di hadapan Kompleks Tun Abdul Razak bersebelahan Panggung Rex, Jalan Wong Ah Fook, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah terdapat di dalam milik kamu, sebutir peluru caliber 32, oleh yang demikian kamu telah melakukan E kesalahan yang boleh dihukum di bawah s 8(a) Akta Senjatapi 1960.

He was found guilty on both amended charges and sentenced to death in respect of the first amended charge and 3 years' imprisonment in respect of the second amended charge. The judgment of the High Court is reported in [1995] 4 MLJ 121. F

He appealed against both the conviction and the sentence in respect of both amended charges.

We dismissed his appeal against the conviction and the sentence in both amended charges. We now give our reasons.

The issues raised in this appeal are essentially of law. We do not G propose to set out the facts in full as they are set out in detail by the learned judge in his judgment.

Further, we observe that the appeal is grounded mainly on the first amended charge. In so far as the second amended charge is concerned, we are of the view, that on the evidence the appellant did not dispute that he H was found in possession of the pistol recovered from him by PW9 in which a live bullet in the barrel was recovered by PW13, the investigation officer, later identified as of type 32 calibre. The dispute as to whether the pistol recovered from the appellant at the scene was the one produced in the High Court was not canvassed by Mr Karpal Singh before us. We take it that he was no longer pursuing the issue. In any event, this issue was correctly I considered by the learned judge and we agreed with his finding and the reasons thereof.

A In respect of the first amended charge, the prosecution will have to adduce evidence in respect of the following ingredients in order to sustain a conviction:

(i) that the appellant committed a schedule offence, namely that he was resisting arrest;

B (ii) that PW9 is a person lawfully empowered to make the arrest;

(iii) that at the time of committing the schedule offence, the appellant discharged a firearm with the intention to cause death or hurt to PW9 notwithstanding that no hurt is caused thereby.

C That the appellant committed a schedule offence

Mr Karpal Singh of counsel for the appellant conceded that the appellant committed a schedule offence (item 3 under the Schedule to the Firearms (Increased Penalties) Act 1971 but contended that s 27(i) of the Criminal Procedure Code (FMS Cap 6) ('the Code') relating to arrest by private person does not apply in this case by virtue of the meaning to the D words 'in his view' stated therein. We will then have to consider ingredient (ii) as stated above.

That PW9 is a person lawfully empowered to make the arrest

In this case, s 27(i) of the Code is relevant and reads:

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> Arrest by private persons and procedure in such cases.
>
> (i) Any private person may arrest any person who, *in his view*, commits a non-bailable and seizable offence and shall without unnecessary delay make over the person so arrested to the nearest police officer or, in the absence of a police officer, take such person to the nearest police station. (Emphasis added.)

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This is the first case where the court has been asked to interpret the words 'in his view' under s 27(i) of the Code. Mr Karpal Singh of counsel for the appellant submitted that on the facts, s 27(i) of the Code is not applicable in this case. He cited two Indian cases — *Durga Singh v Md Isa* [1963] 1 Cri LJ 827 and *Kartar Singh v State* NR 1956 Punjab 122 on the G interpretation of s 59(1) of the Indian Criminal Procedure Code which is in pari materia with our s 27(i) of the Code.

In *Durga Singh*'s case, the court at p 828 held that a private person can arrest any person who commits non-bailable and cognizable offence in his view, 'meaning within sight of him' and not 'in his opinion'. Accused H stealing paddy and running away — Act of stealing seen by A — B on hearing hue and cry coming on scene and catching accused in act of running away — Arrest by B is not under s 59(1) as interpreted by the same court in *Abdul Aziz v Emperor* AIR 1933 Pat 508.

In *Kartar Singh*'s case the court, by way of obiter, in respect of the I interpretation of s 59(1), stated at p 122:

> A person may be certain in his mind that the accused who is running away had committed a non-bailable and cognizable offence because of the statement of

his neighbour which he believes and because of what he himself sees immediately after the commission of the offence, and yet he has no right to arrest the alleged culprit. It would be extremely dangerous to allow a private person to arrest another person under s 59(1) on the basis of his mere opinion, however definite it may be, that the offender had committed a non-bailable and cognizable offence. It would be dangerous to allow a private person to arrest an alleged offender on the basis of his opinion even if it is based on unimpeachable evidence as it would be open to serious misuse.

However, in the High Courts in the States in India, there were divergent views on the interpretation of 'in his view'.

The learned judge (Mohd Ghazali J) in this case had extensively considered the relevant cases in India in concluding that the commission of the offence was within the meaning of the words 'in his view' and accordingly held that PW9 was entitled to arrest the appellant by virtue of s 27(i) of the Code. In the circumstances, it would be appropriate to quote in extensio the learned judge's judgment on this aspect (see [1995] 4 MLJ 121 at pp 128–131):

In *Nazir v Rex* AIR 1951 All 3 (FB), Bind Basni Prasad J, in dealing with the words 'in his view' as found in s 59 of the Indian Criminal Procedure Code which is in pari materia with s 27 of our Code, said (at p 7):

'Section 59 provides as to when a private person may arrest an offender in the following words:

"Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or any proclaimed offender ..."

The words "in his view" must be given a liberal interpretation. They mean not only 'in his sight' but also "in his presence". A narrow interpretation of these words would greatly defeat the objection of this section. Suppose in a winter a person is sleeping inside his room and there is no light in it. A thief makes a hole and tries to enter it. He cannot see the thief; but on hearing the sound he becomes aware of the fact that a thief is breaking the wall. Although he has not actually seen the thief he can arrest him. It would be absurd to hold otherwise. Again suppose a blind woman is sleeping and a thief wants to forcibly remove an ornament from her person. Although she cannot see the thief, there can be no doubt that she can arrest him.'

In *Sheo Balak Dusadh v Emperor* AIR 1948 All 103, which also, inter alia, deals with s 59 of the Indian Criminal Procedure Code, the facts were that the accused were noticed committing the non-bailable and cognizable offence of house-breaking. The inmates along with some neighbours who arrived on hearing the hue and cry, but who had not actually seen the commission of the offence, chased the accused and in the course of the scuffle in arresting the accused, one of the neighbours who was pursuing them was killed. It was held that the persons who had actually seen the thieves at the back of their house were clearly authorized under s 59 of the Code to arrest them; Harish Chandra J said (at p 104):

'(5) Learned counsel for the Crown, Mr Chandra Sekhar Saran, has drawn out attention to an English case in (1824–37) 1 Moody's Crown Cases 207. No doubt this is a very old case but it appears that the law in England in regard to arrest by a private individual in a certain class of cases was

very much the same as it is in India. A private person was authorized to arrest a prisoner while in the actual commission of the offence. It was, however, held that the actual commission of the offence by the prisoner and his subsequent escape constituted one single transaction. The learned judge held:

> "The conviction was lawful, for, as he was seen in the out-house, and was taken on fresh pursuit before he had left the neighbourhood, it was the same as if he had been taken in the out-house, or in running away from it, that it was all one transaction."

(6) A perusal of 9 *Halsbury's Laws of England* (2nd Ed) at p 86 shows that according to English law a private person may also arrest without a warrant any one who in his presence commits a breach of the peace and also when the offender escapes immediately after committing the breach and is taken on fresh pursuit which commenced immediately and is continued without a break.

(7) No Indian case has been cited before us upon this point, but the Madras case *Arumuga Goundan & Ors v Crown* AIR 1924 Mad 384 shows that there is a tendency to give the words 'in the view' wide interpretation. In that case, several persons went to their cocoanut tope in order to see whether any theft of toddy was going on and saw a man standing on the ground with a pot of toddy in his hands and two of his confederates climbing the trees, and arrested the man on the ground. No offence was being actually committed at the time. Krishna J who decided the case observes:

> "The toddy was, in my view, in the process of being taken or removed from the cocoanut tope: the first step in which would be to bring it down from the trees, which the other two persons who were up the trees were trying to do; and the next step would be to carry the toddy away from the tope, which the man standing on the ground was doing as he was collecting the toddy in a pot in his hands. I think one should not put too strained a construction on the words 'in his view' and I think the prosecution witnesses were justified in arresting the first accused, as one of the thieves committing theft in their view."

(8) In our opinion, when a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who either sees him committing the offence or finds him running away immediately after the commission of the offence would be entitled to arrest him under s 59, Criminal PC.'

In *Abdul Aziz v Emperor* AIR 1933 Part 508, the judge said that the words 'in his view' means 'in his presence' or 'within sight of him'; however in *Kartar Singh & Ors v State* AIR 1956 Punj 122. Bishan Narain J was of the view that a private person has no right to effect an arrest unless the offence was committed 'in his presence or sight' and not 'in his opinion'.

In the instant case, was the non-bailable and seizable offence of robbery committed by the accused committed 'in the presence' or 'within sight' of PW9 or was PW9 merely of the 'opinion' that such an offence has been committed by the accused? I would tend to agree with the dicta in *Nazir v Rex* that the words 'in his view' must be given a liberal interpretation and I would also tend to agree with the views of Harish Chandra J in *Sheo Balak Dusadh v Emperor* that when a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single

transaction and any person who either sees him committing the offence or finds him running immediately after the commission of the offence would be entitled to arrest him.

PW9 said that when he was walking towards the side-entrance to KOMTAR, he heard the sound of gun-fire and then heard someone shouting 'Tolong! Kejar perompak!' Almost instantaneously, two men ran past him — one was carrying a plastic bag and another was carrying a gun. It was clear to him that they were the robbers and that they were running away. They were running away in his presence and within sight of him and his immediate reaction was to chase after them. He was certain that they had committed robbery when armed which is an arrestable and non-bailable offence as one of them was brandishing a pistol and he did not hesitate to chase them with the intention to arrest them. He was not chasing them because he was of the opinion that they had committed an offence of robbery — he was certain that they had committed such an offence as he heard the sound of gun-fire and heard cries for help to chase the robbers and immediately saw two persons, one of whom was armed, running past him. Under such circumstances, I would treat the whole episode as one single transaction as hence treat the action of the accused in running away as part of that transaction and hold that the commission of the offence was committed within sight of PW9 and hence would fall within the meaning of the words 'in his view' and accordingly hold that PW9 was entitled to arrest the accused by virtue of s 27 of the Code. The accused was definitely seen in a position which justified PW9 to effect an arrest. The persuasive authorities referred to above discussed that the words 'in his view' can mean 'in his presence' or 'within his sight' which means the courts would interpret those words as going beyond mere opinion. In my view, those words would cover situations as found in the instant case where although the private person did not actually witness the non-bailable and seizable offence being committed, he was certain that those persons running away or trying to escape were the offenders themselves as he was in such close proximity to the scene of the crime.

The words 'in his view' can also be found in s 106 of the Code which reads:

> 'A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public land mark or buoy or other water mark used for navigation.'

In that section, I would think that the words 'in his view' would also mean going beyond mere opinion, that section empowers a police officer to interpose where he perceives that a person's action may result in an injury to public property, although at the time that he interpose, the offence has yet to be committed but there are acts being perpetrated by that person which would seem as being attempts to injure public property. Whether that person's actions amount to such attempts in the view of the police officer would be subjective and is a question of fact dependent upon all the circumstances of the case. Similarly, I would think that whether a non-bailable and seizable offence is being committed or have been committed in the view of a private person is also a question of fact dependent upon all the circumstances of the case.

We agreed with the reasoning and the conclusion of the learned judge on the interpretation of the words 'in his view' under s 27(i) of the Code. In

A our view, the learned judge committed no error and he was perfectly entitled to follow the Indian cases cited by him in his judgment.

With regard to the Singapore case of *Metro (Golden Mile) Pte Ltd v Paul Chua Wah Liang* where the judgment of Choor Singh J, relied on also by Mr Karpal Singh before us and commented in *Malaya Law Review* (Vol 23, No 1 July 1981 at pp 182–184), we did not have the benefit of the full judgment of the said judge. *Metro*'s case is a civil case involving a claim for damages for wrongful arrest by private persons. The case involved alleged shoplifting by Paul Chua Wah Liang and his five children by two employees of Metro. According to *Mallal's Criminal Procedure* (5th Ed, 1998) at p 507, in Singapore the strict view is preferred and citing *Metro*'s case where it is stated that Choor Singh J held that the offence of theft must have been committed in the sight of the private person before the arrest becomes lawful and that mere opinion is insufficient. The Singapore equivalent of our s 27 of the Code is s 34 of their Criminal Procedure Code (Cap 68).

The learned judge in this case had expressed a preference for the liberal view following the Indian cases cited by him. In view of the conflicting decisions in the High Courts in India, the legislature there had in 1973 amended the words 'in his view' in s 59 of the repealed Indian Criminal Procedure Code of 1898 in the new s 43 of the Indian Criminal Procedure Code of 1973 (effective 25 January 1974) by the phrase 'in his presence' thereby confirming that a liberal interpretation was preferable. While we agree that the words 'in his view' should be given a liberal interpretation, we would, however, state that these words should not cover arrest on mere suspicion or opinion. Those words would certainly cover, as held by the learned judge in this case in situations where although the private person did not actually witness the non-bailable and seizable offence being committed, he was certain that those persons running away or trying to escape were the offenders themselves as he was in such close proximity to the scene of the crime.

In this case, it is not disputed that an offence of armed robbery, a non-bailable and seizable offence, was committed and the appellant was seen running away from the scene of the crime and soon thereafter was apprehended by PW9 though the appellant could not be identified as one of the robbers by PW8 (Lee Kien Hoe). However, PW8 said that after withdrawing a sum of over RM10,000, he left the bank together with his friend but as he was about to leave the said building by the side-entrance which led to the car-park, he was confronted by two men. One of the men pointed a gun at him and then took the said money which he was carrying. The two men left by the side-entrance and ran towards the car-park. PW8 then shouted that he has been robbed whilst his friend ran after the two men and managed to retrieve the said sum of money. He also heard the sound of gun-fire whilst he was within the said building. He subsequently saw the two men running from the car-park and crossing the road in front of the said building (see pp 191–192 of the appeal record). PW9 himself, a member of the public, at about the time he parked his car at the car-park was about to use the side-entrance of the building known as KOMTAR, when he heard the sound of gun-fire and someone shouting 'Tolong! Kejar perompak!'

PW9 saw two men running past him, one was carrying a plastic bag whilst the other whom he later identified as the appellant held a pistol in his hand. He gave chase and successfully apprehended the appellant. On the evidence it could not possibly be said that PW9 was acting on mere suspicion or mere opinion that a non-bailable and seizable offence had been committed. In our view, a narrow interpretation of the words 'in his view' would greatly defeat the object of the section. The words 'in his view' should therefore mean 'in his presence' or 'within sight of him'.

Another issue raised before the learned judge was whether the words 'Tolong! Kejar perompak!' amount to hearsay and therefore inadmissible. This issue had been aptly covered by the learned judge and as this issue was not raised by Mr Karpal Singh before us, we should therefore decline to consider it here.

That at the time of committing the scheduled offence, the appellant discharged a firearm with the intention to cause death or hurt to PW9 notwithstanding that no hurt is caused thereby

Mr Karpal Singh of counsel for the appellant submitted that on the evidence the discharge of the firearm by the appellant was accidental and there was lack of intention to cause death or hurt to PW9. The former counsel for the appellant also submitted before the learned judge that the pistol was discharged accidentally during the struggle between the appellant and PW9, that is, there was no intention on the part of the appellant to cause death or hurt to PW9.

This issue had been amply covered by the learned judge where he concluded (see [1995] 4 MLJ 121 at p 128):

> In his evidence, PW9 stated that he wanted to arrest the accused and hand him over to the police; he said: 'Saya hendak tangkap orang itu dan serahkan kepada polis'. From the evidence, it is clear that PW9 chased after the accused with the intention of arresting him and that when he caught up with the accused, the accused drew his pistol and consequently there was struggle. There was a struggle because the accused was resisting his own arrest. That surely is tantamount to committing a scheduled offence as enumerated in the Schedule to the 1971 Act. The evidence given by PW9 shows that the accused have discharged the pistol and that the accused himself was hurt in the process — that end result occurred as a result of PW9 having succeeded in pointing the direction of the pistol away from him. PW9 has stated that there was a lapse of two minutes between the first and second shot. Under such circumstances I cannot see how it can be argued that the accused never had the intention to cause death or hurt to PW9. It is clear that the accused discharged the pistol at the time when he was committing the scheduled offence and it is my finding that the evidence clearly shows that the accused did intend to cause death or hurt to PW9 when he discharged the pistol notwithstanding that PW9 was not hurt. The fact that it was the accused who was hurt in the process is irrelevant.

As the finding of the learned judge on this issue is based on finding of facts and credibility of witnesses, the appellate court should be slow to disturb such finding as credibility of a witness is primarily a matter for the trial judge unless the decision was plainly wrong and was against the weight of the

A evidence (*Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232). In the circumstances, we were not convinced that the learned Judge was wrong.

The issue of the competency of the expert witnesses, namely the assistant armourer (PW1) and the senior chemist (PW6) was adequately considered by the learned judge (pp 211–216). Similarly on the issue of the
B serviceability of the pistol and its identity was also considered by the learned judge (pp 216–218 of the appeal record). These two issues were not raised by Mr Karpal Singh before us and hence there would be no necessity for us to consider them.

The learned judge, in our view, had correctly evaluated the evidence of the prosecution and the defence before him and the law applicable thereto.
C We were satisfied that the learned judge committed no errors and there were no grounds for us to interfere with his judgment.

The appeal against the conviction was accordingly dismissed by us. The only sentence under s 3 of Act 37 is death and we therefore affirmed the sentence of death imposed by the learned judge against the appellant. As for
D the sentence in respect of the second amended charge, the sentence of three years' imprisonment is not manifestly excessive and we affirmed it. In any event, Mr Karpal Singh did not address to us on the said sentence for our consideration.

Appeal dismissed and sentences confirmed.

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Reported by Andrew Christopher Simon

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